

PACIFIC FISHERY MANAGEMENT COUNCIL

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December 20, 2004

Vice Admiral Conrad C. Lautenbacher, Jr.
Under Secretary of Commerce for Oceans and Atmosphere
NOAA, HQTR Route: A
BLDG: HCHB RM: 5128
14th and Constitution Avenues NW
Washington, DC 20230-0001

Re: The Process of Establishing Fishing Regulations in Federal Waters of National Marine Sanctuaries

Dear Vice Admiral Lautenbacher:

The Pacific Fishery Management Council (Pacific Council) met November 1-5, 2004 in Portland Oregon to consider, among other matters, establishing fishing regulations in federal waters of the Cordell Bank and Monterey Bay National Marine Sanctuaries. As part of the deliberations on these matters, the Pacific Council received an October 22, 2004 letter from Mr. Daniel Basta informing the Pacific Council of the "National Oceanic and Atmospheric Administration (NOAA) preferred alternative" with regard to a range of alternative fishing regulations. This terminology can be taken as contradictory to what the Pacific Council has understood to be the Regional Fishery Management Council (RFMC) role as described in the National Marine Sanctuaries Act (NMSA), what has been conveyed by senior leadership in the National Ocean Service (NOS) and National Marine Fisheries Service (NMFS), and what we understood during coordination efforts with the staff from the Sanctuaries in question. The Pacific Council tasked me with providing you a letter describing the basis for our concern about this potential contradiction and ask for clarification of the process in determining the NOAA preferred alternative for regulating fishing activities within National Marine Sanctuaries.

As has been noted on several occasions, the Pacific Council appreciates the cooperative partnership with NOAA in the management of our nation's living marine resources, acting on behalf of the Secretary of Commerce as described in the Magnuson-Stevens Fishery Conservation and Management Act. Traditionally, this partnership has focused on conservation and management of U.S. fisheries in conjunction with NMFS. More recently, a growing emphasis on ecosystem management and marine protected areas has broadened the focus of our partnership and added the participation of other NOAA line agencies, principally, the NOS and its National Marine Sanctuary Program (NMSP). I am referring, specifically, to recent proposals to manage federal fisheries within National Marine Sanctuaries.

In this regard, it appears to the Pacific Council the NMSA mandates that RFMCs be provided the opportunity to draft fishing regulations if it is deemed necessary to regulate fishing activities within federal waters of a Sanctuary. Section 304(a)(5) of the NMSA states:

“The Secretary shall provide the appropriate Regional Fishery Management Council with the opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone as the Council may deem necessary to implement the proposed designation. Draft regulations prepared by the Council, or a Council determination that regulations are not necessary pursuant to this paragraph, shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council’s action fails to fulfill the purposes and policies of this chapter and the goals and objectives of the proposed designation. In preparing the draft regulations, a Regional Fishery Management Council shall use as guidance the national standards of section 301 (a) of the Magnuson-Stevens Act (16 U.S.C. 1851) to the extent that the standards are consistent and compatible with the goals and objectives for the proposed designation. The Secretary shall prepare the fishing regulations, if the Council declines to make a determination with respect to the need for regulations, makes a determination, which is rejected by the Secretary, or fails to prepare the draft regulations in a timely manner. Any amendments to the fishing regulations shall be drafted, approved, and issued in the same manner as the original regulations.”

Further, at the November 2003 Pacific Council meeting in San Diego, California under an agenda item titled “Jurisdiction and Authority Issues for Marine Protected Areas,” Mr. Jamison Hawkins and Dr. Rebecca Lent presented the NOAA perspective on the role of the RFMCs; their presentation was entirely consistent with the concept of initial jurisdiction and authority belonging to the RFMCs in determining fishing regulations in National Marine Sanctuary federal waters. Mr. Michael Weiss (National Marine Sanctuary Program Deputy Director), in response to a direct question on the process, highlighted the unique role of the regional councils. Specific to the regulation of fishing activities, he noted that Congress explicitly directed the NMSP to follow a rigorous process, which includes providing “first opportunity” to the appropriate RFMC to draft fishing regulations (Council Minutes, November 2003).

The Pacific Council received similar reinforcement of this perspective in working closely with the three central California coast sanctuaries (Gulf of the Farallones National Marine Sanctuary [GFNMS], Cordell Bank National Marine Sanctuary [CBNMS], and Monterey Bay National Marine Sanctuary [MBNMS]) over the past year during their joint Sanctuary Management Plan Review process (JMPR process). On several occasions, sanctuary program staff briefed the Council on the JMPR process, including specific actions being contemplated that could require regulation of fishing activities within a Sanctuary. The Council very much appreciates the cooperative spirit of the representatives of these three central coast Sanctuaries; it has resulted in what we view as a positive, successful working relationship.

At the November 2004 meeting, Sanctuary staff formally requested Council action to develop fishing regulations for several proposed management measures at CBNMS and MBNMS (aforementioned October 22 letter from Mr. Daniel Basta to Council Chairman Donald Hansen).

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These Sanctuaries also requested Council review and input about proposed changes to Sanctuary Designation Documents, which would be necessary for implementation of proposed measures to regulate fishing activity. The Council has responded to these requests under separate letter to Mr. Basta. In these letters the Council formally requested extension of the Designation Document review and fishing regulation drafting timelines to accommodate the March and April 2005 Council meetings. Specifically, the Council requested these extensions to provide opportunity for the Council and its advisory bodies to review and comment on written analyses of proposed actions, and because the comment periods would end before the next Council meeting.

The purpose of this letter is to highlight the Council's concern about terminology used in the October 22, 2004 letter and the appearance that the Council's recognized and mandated role is being minimized under the current actions proposed by CBNMS and MBNMS. In documents prepared by the Sanctuaries and provided to the Council, specific alternatives are identified as "NOAA preferred alternatives." The Council is very concerned about alternatives being identified as "NOAA preferred" prior to formal Council review, consideration, or input. It is difficult to understand how the Council can have meaningful "opportunity to prepare draft regulations for fishing," as stated in the NMSA, particularly "first opportunity" as stated by NOS leadership, if preferred alternatives have been selected by NOAA prior to Council input. We are also unsure of the process by which a NOAA preferred alternative was determined in these instances. Neither an Environmental Impact Statement (EIS) nor Environmental Assessment (EA) has been prepared to provide a basis for determining a "preferred alternative," either by the Council or NOAA as an agency.

The Pacific Council expressed a very similar concern about the Council role being preempted in a letter to you dated October 22, 2002 regarding the Channel Islands National Marine Sanctuary. The Pacific Council was heartened by your prompt response that did not recognize an *a priori* NOAA preferred alternative and encouraged "meaningful participation by the Council." Based on your October 25, 2002 letter, assurances provided by your senior staff in November 2003 about the "first opportunity" role of the regional councils in development of fishing regulations within federal waters of National Marine Sanctuaries, and our understanding of the NMSA mandate for a significant and consequential role during the developmental stage of such matters, we could presume the use of the term "NOAA preferred alternative" in the case at hand to have been an unintended oversight. If so, the Council requests the term "NOAA preferred alternative" be removed from the current documents and not be included in future documents until after completion of an inclusive National Environmental Policy Act environmental analyses, including formal consultation with the Pacific Council. If not, we ask for further clarification of the role of RFMCs in development, implementation, monitoring, and evaluation of measures to regulate fishing activities within federal waters of a National Marine Sanctuary.

Thank you for your attention to this important matter.

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If you have any questions about our request or need additional information, please don't hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "D. O. McIsaac", followed by a vertical line.

D. O. McIsaac, Ph.D.
Executive Director

DAW:kla

c: Dr. William Hogarth
Dr. Rebecca Lent
Council Members
Ad Hoc Marine Protected Areas Committee
Regional Fishery Management Council Executive Directors
Mr. Daniel Basta
Mr. Jamison Hawkins
Mr. Dan Howard
Mr. Huff McGonigal
Ms. Holly Price
Ms. Anne Walton
Mr. Michael Weiss